the Criminal Procedure Code. The order of forfeiture is, therefore, confirmed.

Order of forfeiture confirmed.

LEE ENG TEH & ORS. v. TEH THIANG SEONG & ANOR.

[O.C.J. (Gill J.) August 1, 1966]

[K.L. — Civil Suit No. 278 of 1965]

Trust and Trustees — Promise to donate land for building school — Whether promise enforceable — Whether complety or incompletely constituted trust — Charity — Charitable fund — Joining Attorney-General as party — Government Proceedings Ordinance, 1956, s. 9.

The plaintiffs who claimed to be trustees and principal officers of a school in Klang brought an action against the defendants for a declaration that the school was entitled to land in Klang and for an order that the land be transferred to three of the plaintiffs as trustees for the school. The Attorney-General was joined as a plaintiff with his consent. It was alleged that the first defendant had agreed to donate the land to the school. At that time the first defendant was not the registered owner of the land but he was the managing director of the second defendant company who had purchased the land for development. The defendant company as such had not made any promise to donate any part of the land to the school. The school had a building committee of which the first defendant was chairman. This committee had collected funds and they had put up a school on part of the land.

Held: (1) the plaintiffs by themselves could not have maintained the action but as the money collected for the school constituted a charitable fund, a right to sue arose with the joining of the Attorney-General;

(2) the first defendant incurred no contractual liability by making a promise to donate the land for the building of the school and as the promise was a gratuitous one there was no question of any incompletely constituted trust having arisen;

(3) the second defendants having allowed the school to be built on their land, must be deemed to hold such land subject to the equity that they will allow the school building to remain there indefinitely; but it is not the sort of equity on the basis of which in the absence of an unequivocal promise by the second defendant to make a charitable gift, the plaintiffs are entitled to the the declaration they were asking for.

Cases referred to:—

(1) *Strickland* v. *Weldon* (1895), 28 Ch. D. 426.

(2) *Re Hudson* (1885), 54 L.J. Ch. 811.

(3) *Re Cory* (1912), 29 T.L.T. 18.

(4) *Ellison* v. *Ellison* (1802), 6 Ves. 656, 662; 6 R.R. 19.

(5) *Milroy* v. *Lord* (1862), 4 De G.F. & J. 264; 31 L.J. Ch. 798.

(6) *Ex parte Watson* (1888), 21 Q.B.D. 301.

(7) *Tomkinson* v. *South-Eastern Railway Co.* (1887), 35 Ch. D. 675.

(8) *Dillwyn* v. *Llewelyn* (1862), 6 L.T.R. 878.

(9) *Ramsden* v. *Dyson* (1866), L.R. 1 H.L. 129, 170.

(10) *Plimmer* v. *Wellington Corporation* (1884), 9 App. Cas. 699.

(11) *Gregory* v. *Mighell* (1811), 18 Ves. 328.

(12) *Inwards & Ors.* v. *Baker* [1965] 2 W.L.R. 212.

CIVIL SUIT.

Dato' S. P. Seenivasagam (*J. H. Yong* with him) for the plaintiffs.

Miss Chan for the Attorney-General.

C. H. Smith (*R. R. Chelliah* with him) for the defendants.

Cur. Adv. Vult.

Gill J.: This is a suit for a declaration that the Kwang Hwa High School, Klang is entitled to 30 acres (or an undivided 4,800/9,985 shares) of the second defendants' land held under Certificate of Title No. 25889 for Lot 3476 in the Mukim of Bukit Raja, District of Klang, Selangor, for an order that the second defendants do transfer to the first three plaintiffs as trustees of the said school the said undivided share in the said land or any other order which this court may think fit and equitable to grant, and for damages against the defendants.

The action was commenced by the first three plaintiffs as the alleged trustees and principal officers of and on behalf of the Kwang Hwa High School, Klang. The Attorney-General subsequently gave his consent in writing, under the provisions of section 9 of the Government Proceedings Ordinance, 1956 relating to charitable trusts, for the institution of these proceedings and for him to be joined as the fourth plaintiff.

The facts of the case are as follows. In the year 1954 approximately 75 residents of Klang constituted themselves into a committee known as the Kwang Hwa High School Building Committee, with the first defendant as chairman, for the purpose of collecting funds to build a new Chinese school in Klang. They made an appeal for support from the public by issuing a circular letter and a manifesto stressing the need to establish a comprehensive senior and junior middle school by amalgamating the then existing schools in Klang. It was made known to the public that the committee was looking for land for the new school and was even prepared to buy land.

The first defendant offered to sell the land which is the subject matter of the suit. After this offer of sale by the first defendant, one Ng Chee Gian came forward with an offer to donate 30 acres of land at Padang Jawa for the proposed school. The offer by Ng Chee Gian was discussed at the fourth and fifth general meetings of the building committee, but it was not accepted as the land offered was considered unsuitable for the school.

The first defendant then made a further offer, this time to donate the land which he had previously offered to sell. The offer was accepted by the committee and a dinner was held

at a Chinese restaurant in Klang in honour of the generosity of the first defendant. Several persons spoke at the dinner thanking the first defendant for the gift. The first defendant made a speech in reply and said that he had obtained the consent of the shareholders to donate the land to the school. He confirmed his offer by letter which was read out at a meeting of the building committee. The letter, however, has not been produced, as it is alleged to have been mislaid.

At the time of his offer the first defendant was not the registered owner of the land in question, but he, on behalf of a partnership known as Eng Ann Construction Company in which perhaps he held the largest shares, had already entered into a binding contract to purchase a piece of land to be developed into a housing estate and had paid a deposit in respect thereof. It was out of that piece of land that approximately 30 acres of land was to be made available for the proposed school.

It would seem clear that the intention all along was to form a company for the purpose of purchasing the land in question. The company so incorporated was the second defendant company which is the present registered proprietor of the land. The first defendant became a permanent managing director of the second defendant company, but the company as such at no time made any promise to donate any part of its land to the school.

The building committee collected approximately $180,000 from the public for the building fund. Plans were put up for the building of the school. The first defendant all along acted in a dual capacity, namely, as the chairman of the building committee as well as the managing director of the second defendant company. He signed the building plans which were sent to the Town Council for approval as the managing director of the second defendant company. After the building was completed it was registered as a school and pupils were enrolled from 1961. The area covered by the school building is approximately 5 acres. This land and the remaining land which was offered to the school has not been transferred to trustees for the school, nor have the second defendants, the registered proprietors of the land, sought to get back their land from the school.

It is to be observed that the claim is founded on the first defendant's promise to donate 30 acres of land for the building of a school. It is alleged in the statement of claim that, as the first defendant offered to donate land after learning of a similar and earlier offer by Mr. Ng Chee Gian, his offer was made in consideration of the building committee agreeing not to accept the offer made by Mr. Ng Chee Gian. This allegation, however, is not supported by evidence.

It is alleged in the statement of defence that the condition on which the first defendant was prepared to offer to donate 30 acres of land was that three Chinese secondary schools in Klang, namely, the Wah Khiu High School, the Hin Hwa High School and the Chong Hwa High School, should be amalgamated into one school which would be erected on the land to be donated and that the said three schools would then cease to function. No evidence, however, has been produced to support this allegation, the evidence for the plaintiffs being that the offer was unconditional.

Paragraph 1 of the statement of claim contains two averments; firstly, that the first three plaintiffs are the trustees and principal officers of the Kwang Hwa High School, Klang, and, secondly, that they are suing for and on behalf of the said school. In paragraphs 6 and 8 of the statement of claim there is an averment that there was a contract entered into with the school. The fallacy of this latter averment lies in the fact that there was no school in existence at the time of the alleged contract. Moreover, a school as such cannot enter into a contract. In this connection *Halsbury* (3rd edition) Vol. 8 at page 64, paragraph 105, states as follows:—

> "There are many kinds of voluntary associations, which, being unincorporated, have no legal entity, and therefore cannot as such enter into any contract. Examples of such associations are unincorporated members' clubs, unincorporated building societies and charitable institutions, and voluntary associations for the purpose of carrying out temporary functions of a social character.
>
> Associations of this kind can neither sue nor be sued on contracts made in their name or on their behalf; nor can they authorise an officer to sue or be sued on their behalf on such contracts, even if their rules purport to give them power to do so, except where this power has been expressly conferred by Act of Parliament".

It follows therefore that the first three plaintiffs by themselves could not maintain this action. This indeed was the argument put forward by counsel on behalf of the defendants, and to my mind it must prevail.

It has been contended on behalf of the plaintiffs that the 75 individuals who called themselves the building committee were the donees of the gift, and that the offer of a gift by the first defendant was made in consideration of their undertaking to build a school, apart from other considerations. This contention is tantamount to saying that the first three plaintiffs are suing on behalf of themselves and the other members of the committee. A similar contention was put forward in the case of *Strickland* v. *Weldon* [1] in which an action was brought by five of the members of a church building committee, on behalf of themselves and the other members of the committee, against a

former member, claiming an account of all moneys received and paid by him in respect of the church building fund during the period of his membership. The fund was raised by voluntary subscriptions, seventeen persons having constituted themselves into a committee to receive subscriptions for the purpose of improving the church of the parish, and to apply the moneys thus collected. It was held that, the members of the committee being mere agents of the subscribers, the action could not be maintained by some of the agents against the others, and that even if all the subscribers were suing, the action could not be maintained in the absence of the Attorney-General. Pearson J. stated in that case (at page 429) as follows:

"The case has been argued as if the plaintiffs were ordinary trustees for a civil purpose, who, having associated with them another trustee who has some of the trust funds in his hands, are entitled to sue him in this court in order to compel him to place those trust funds where they ought to be, in the names of all the trustees. But, in my opinion, the plaintiffs are not trustees in the ordinary sense of the word; the members of the committee are nothing but agents — every one of them is an agent, for the subscribers; and, to my mind, the notion that two agents out of three can sue the third for money which the principal has directed to be paid to him is an entire novelty".

In the present case the money collected for the building of the school constituted a charitable fund. It is for this reason that a consent was obtained from the Attorney-General and he was added as a party by being named as the fourth plaintiff. It is clear that but for the consent of the Attorney-General or his being made a party to the action, the present action would not be maintainable.

On the basis that with the joining of the Attorney-General there is a right to sue, the question arises as to whether on the facts of this case the plaintiffs can obtain any remedy against the first defendant. The case against the first defendant is that he made a promise to donate 30 acres of land for the building of a school. It is contended that promise can be taken to mean that either the first defendant had contracted to transfer 30 acres of land to trustees for the building of a school or to declare himself a trustee for that purpose. The question however, is whether a mere gratuitous promise to subscribe to the charity has any legal consequences. A short answer to that is that such a promise cannot be sued upon. This is clear from the case of *Re Hudson* [2] in which there was a promise to give £20,000 in five equal instalments to a jubilee fund. After paying three instalments the promisor died. It was held that the two remaining instalments could not be recovered against his estate. Similarly, in *Re Cory* [3] at the death of the testator certain promises by him of donation to various institutions remained unredeemed. It was held that these promises created no contractual obligations between the parties and therefore there was no legal debt due from the testator's estate to the institutions. It is to be observed that in this latter case the promise of donations was made to some existing charitable institution. In the present case there was a promise to donate to a proposed charitable fund. Thus, it is abundantly clear that the first defendant incurred no contractual liability by making a promise to donate 30 acres of land for the building of a school.

The next question to be considered is whether the promise made by the first defendant constituted a trust which is enforceable. Whether a trust is enforceable or not depends upon whether it is completely or an incompletely constituted trust. A trust is said to be completely constituted when the trust property has been vested in trustees for the benefit of the beneficiaries: until that has been done the trust is incompletely constituted. The distinction between completely and incompletely constituted trusts is of importance principally with regard to the question of consideration. In other words, the question to be considered is whether valuable consideration was given for the creation of the trust. If valuable consideration is given in exchange for the creation of the trust, it does not matter whether the trust is completely constituted or not, for equity regards as done that which ought to be done and will perfect an imperfect conveyance for value by treating it as a contract to convey. But there is no equity to perfect an imperfect voluntary trust. As was said by Lord Eldon in *Ellison* v. *Ellison* [4]:—

"I take the distinction to be, that if you want the assistance of the court to constitute a *cestui que trust*, and the instrument is voluntary, you shall not have that assistance, for the purpose of constituting a *cestui que trust*, as upon a covenant to transfer stock, if it rests in covenant, and is purely voluntary, this court will not execute that voluntary covenant, but if the party has completely transferred stock, though it is voluntary, yet the legal conveyance being effectually made, the equitable interest will be enforced by this court".

The general principle applicable has been enunciated by Turner L.J. in *Milroy* v. *Lord*, [5] as follows:—

"In order to render a voluntary settlement valid and effectual, the settler must have done everything which, according to the nature of the property comprised in the settlement, was necessary to be done in order to transfer the property and render the settlement binding upon him. He may, of course, do his by actually transferring the property to the persons for whom he intends to provide, and the provision will then be effectual; and will be equally effectual if he transfers the property to a trustee for the purposes of the settlement, or declares that he himself holds it in trust for those purposes . . . . But, in order to render the settlement binding, one or other of these modes must (as I understood the law of this court) be resorted to, for there is no equity in this court to perfect an imperfect gift".

In the present case, of course, there is no question of any conveyance having been made. In other words, matters did not go so far as to

lead up to what might be called an incompletely constituted trust. The first defendant did nothing more than make a gratuitous promise to donate land, so that there was no question of any incompletely constituted trust having arisen. The action against him, therefore, must fail.

Coming to the question of liability of the second defendant company, if any, it is to be observed that the company had not been incorporated as such before the offer by the first defendant was made. It is true that the first defendant was a prime mover in the formation of the company and subsequently became the company's managing director, but his promise as the director of an unincorporated company could not have the effect of binding the company when it was subsequently incorporated (see *Ex-parte Watson* [6]). It has been argued on behalf of the plaintiffs that the building of the school on the company's land benefited the company by enhancing the value of their land, but that fact alone would not prevent the proposed donation of land from being *ultra vires* the company's powers contained in the articles of association (see *Tomkinson* v. *South-Eastern Railway Company* [7]).

A further basis on which the plaintiffs rest their claim is that subsequent acts of the donor may give the intended donee a right to enforce an incomplete gift. The authority for this proposition is the case of *Dillwyn* v. *Llewelyn* [8] in which the Lord Chancellor stated the principle to be as follows:—

"A voluntary agreement will not be completed or assisted by a court of equity; in cases of mere gift, if anything be wanting to complete the title of the donee, a court of equity will not assist him in obtaining it, for a mere donee can have no right to claim more than he has received. But the subsequent acts of the donor may give the donee that right or ground of claim which he did not acquire from the original gift. Thus, if *A.* gives a house to *B.*, but makes no formal conveyance, and the house is afterwards, on the marriage of *B.* included, with the knowledge of *A.*, in the marriage-settlement of *B.*, *A.* would be bound to complete the title of the parties claiming under that settlement. So if *A.* puts *B.* in possession of a piece of land, and tells him, 'I give it you, that you may build a house on it'; and *B.*, on the strength of that promise, with the knowledge of *A.*, expends a large sum of money in building a house accordingly, I cannot doubt that the donee acquires a right from the subsequent transaction to call on the donor to perform that contract which arises from the contract, and to complete the imperfect donation which was made".

The defendants also rely upon the following statement of the law by Lord Kingsdown in *Ramsden* v. *Dyson*,[9] which was expressly affirmed and approved by the Privy Council in *Plimmer* v. *Wellington Corporation* [10]:—

"The rule of law applicable to the case appears to me to be this: If a man, under a verbal agreement with a landlord for a certain interest in land, or, what amounts to the same thing, under an expectation, created or encouraged by the landlord, that he shall have a certain interest, takes possession of such land, with the consent of the landlord, and upon the faith of such promise or expectation, with the knowledge of the landlord, and without objection by him, lays out money upon the land, a court of equity will compel the landlord to give effect to such promise or expectation. This was the principle of the decision in *Gregory* v. *Mighell*,[11] and, as I conceive, is open to no doubt".

The cases mentioned in the last paragraph were considered and applied in the case of *Inwards and Others* v. *Baker* [12] in which Lord Denning stated (at pages 216 and 217) as follows:—

" . . . . It is quite plain from those authorities that if the owner of land requests another, or indeed allows another, to expend money on the land under an expectation created or encouraged by the landlord that he will be able to remain there, that raises an equity in the licensee such as to entitle him to stay. He has a licence coupled with an equity. . . .

So in this case, even though there is no binding contract to grant any particular interest to the licensee, nevertheless the court can look at the circumstances and see whether there is an equity arising out of the expenditure of money. All that is necessary is that the licensee should, at the request or with the encouragement of the landlord, have spent the money in the expectation of being allowed to stay there. If so, the court will not allow that expectation to be defeated where it would be inequitable so to do. In this case it is quite plain that the father allowed an expectation to be created in the son's mind that this bungalow was to be his home. It was to be his home for his life or, at all events, his home as long as he wished it to remain his home. . . .

. . . . It is an equity well recognised in law. It arises from the expenditure of money by a person in actual occupation of land when he is led to believe that, as the result of that expenditure, he will be allowed to remain there. It is for the court to say in what way the equity can be satisfied. I am quite clear in this case it can be satisfied by holding that the defendant can remain there as long as he desires to as his home".

Applying the above principle to the present case, it is clear that the second defendants, having allowed the school to be built on their land, must be deemed to hold such land subject to the equity that they shall allow the school building to remain there indefinitely. This equity would be an effective answer to any attempt on their part to get back that part of their land on which they allowed the school to be built, but it is not the sort of equity on the basis of which, in the absence of an unequivocal promise by the second defendants to make a charitable gift, the plaintiffs are entitled to the declaration they are asking for. In the circumstances the claim as framed against the second defendants must also fail. I have therefore no option but to dismiss the action against both defendants with costs to be paid by the first three plaintiffs. They must also pay the costs of the Attorney-General. I also make an order that the *caveat* lodged by the first three plaintiffs against the land be removed.

Before concluding the matter, I would express the hope that the second defendants would do something to regularize the position of the

school in relation to their land by some sort of sub-division of such part of their land as they are prepared to set aside for the purposes of the school and have it vested in themselves as trustees for that purpose or vest it in some other persons as trustees after consultation with the Attorney-General.

Action dismissed.

Solicitors: *Dato' S. M. Yong & Co.; R. R. Chelliah Bros.*

STEPHEN KALONG NINGKAN v. TUN ABANG HAJI OPENG & TAWI SLI (No. 2)

[O.C.J. (Pike C.J. (Borneo)) December 2, 1966]

[Kuching — Civil Suit No. K. 88 of 1966]

Constitutional Law — Proclamation by Yang di-Pertuan Agong under Federal Constitution art. 150 — Allegation that it was not made bona fide but in fraudem legis — Whether matter beyond jurisdiction of court — Allegation that Act of Parliament is null and void and ultra vires — Constitution of Malaysia arts. 4, 32, 40, 128, 150 and 161.

Constitutional Law — Immunity of the Yang di-Pertuan Agong — Whether acts of the Federal-Government in the name of the Yang di-Pertuan Agong and acts of the Yang di-Pertuan Agong on the advice of the Federal Cabinet protected — Constitution of Malaysia, art. 32(1).

Legislation — Act of Parliament — Allegation that Act is null and void and ultra vires — Act of Parliament can only be questioned in action for declaration that law is invalid — Necessity to obtain leave of judge of Federal Court.

In this case the plaintiff had claimed —

(a) a declaration that the calling, meeting and vote of the Council Negri on September 23, 1966, was illegal, null, void and of no effect;

(b) a declaration that his purported dismissal by the first defendant was *ultra vires*, null and void;

(c) a declaration that the purported appointment of the second defendant as Chief Minister was illegal, null, void and of no effect;

(d) a declaration that the plaintiff is and was at all material times from July 22, 1963, the Chief Minister of Sarawak.

In the plaintiff's statement of claim he claimed (a) that the proclamation of a state of emergency made by the Yang di-Pertuan Agong on the advice of the Federal Cabinet on September 14, 1966 was null, void and of no effect by reason of the fact that it was not made *bona fide* but was made in *fraudem legis* (b) that the Emergency (Federal Constitution and Constitution of Sarawak) Act, 1966 of the Parliament of Malaysia was null, void and of no effect. The defendants applied for the writ and pleadings to be struck out because they involved matters beyond the jurisdiction of the court.

Held: (1) article 32(1) of the Constitution of Malaysia only protects the Yang di-Pertuan Agong personally from proceedings in a court but cannot be construed to protect the Federal Government from action in the courts in respect of its acts committed in the name of the Yang di-Pertuan Agong and when the Yang di-Pertuan Agong acts on the advice of the Federal Cabinet his act must be deemed to be the act of the Federal Government;

(2) since the *bona fides* of the making of the proclamation of emergency in this case was challenged there was a cause of action within the jurisdiction of the court and without hearing evidence it would not be possible to say whether it will succeed or fail; the court would be usurping the functions of the trial judge if it acceded to the request to strike out the writ and statement of claim on his point;

(3) the plaintiff could not in an action against the defendants ask the High Court to make a declaration that a Federal law is invalid on the ground mentioned in article 4 of the Constitution;

(4) the leave of a judge of the Federal Court must be obtained before proceedings for a declaration of the invalidity of a Federal law can be brought in the High Court and as this was not done in this case the writ of summons and the statement of claim, in so far as they alleged the invalidity of the Act of the Federal Parliament must be struck out.

Cases referred to:—

(1) *Goodson* v. *Grierson* [1908] 1 K.B. 761.

(2) *Charles Forte Investment Ltd.* v. *Amanda* [1963] 3 W.L.R. 662.

(3) *Bhagat Singh & others* v. *The King Emperor* (1931), L.R. 58 I.A. 169.

(4) *The King Emperor* v. *Benoari Lal Sharma* [1945] A.C. 14.

(5) *Regina* v. *Governor of Brixton Prison* [1962] 2 Q.B. 243.

(6) *Liversidge* v. *Anderson* [1942] A.C. 206.

(7) *Wenlock* v. *Moloney* [1965] 1 W.L.R. 1238.

(8) *Bull* v. *Attorney-General for New South Wales* [1916] A.C. 564.

(9) *East Midlands Gas Board* v. *Doncaster Corporation* [1953] 1 All E.R. 54.

APPLICATION TO STRIKE OUT WRIT OF SUMMONS AND STATEMENT OF CLAIM IN CHAMBERS.

Tan Chiaw Thong (Attorney-General) as *amicus curiae.*

T. O. Thomas for the plaintiff.

George Seah for the defendants.

Cur. Adv. Vult.

Pike C.J. (Borneo): The defendants in the above suit make application, through their advocate Mr. George Seah, to strike out the writ of summons and statement of claim herein on the ground that they involve matters beyond the jurisdiction of this court.

The plaintiff who, until dismissed on the 24th day of September, 1966, by the first defendant in his capacity as Governor of Sarawak, was the Chief Minister of Sarawak, claims the declarations set out hereunder and seeks an injunction to restrain the second defendant from acting as Chief Minister of Sarawak.

1. A declaration that the calling, meeting and vote of Council Negri on the 23rd day of September 1966 were illegal, null, void and of no effect.